U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 1 6 2010
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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. According to the Form I-140, part 6, the petitioner seeks to employ the beneficiary as a "Financial Research Analyst for Alzheimer Treatments."[1] On the uncertified ETA Form 9089, the petitioner indicated that the beneficiary currently works for the petitioner as a "controller."[2]

The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director did not contest that the beneficiary qualifies for classification as an alien of exceptional ability or a member of the professions holding an advanced degree, but concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). For the reasons discussed below, we uphold the director's decision. In fact, as will be discussed in more detail below, some of the director's favorable findings must be withdrawn as they are not supported by the record.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

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[1] The petitioner listed Standard Occupational Classification (SOC) Code 13-2051.

[2] The SOC Code for "controller," which falls under financial managers, is 11-3031 according the Occupational Outlook Handbook, available online at www.bls.gov/oco/ocos010.htm, accessed March 15, 2010 and incorporated into the record of proceedings.

(B) Waiver of job offer.

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

The beneficiary holds a Bachelor of Science in Commerce in Business Administration from the University of Saint Thomas in the Philippines. The degree was awarded in March 1997. The petitioner also submitted confirmation that the beneficiary worked as a reconciliation analyst for Equitable PCI bank from December 1997 through at least May 2, 2003, more than five years. The beneficiary's current occupation and the occupation for the SOC code listed for the prospective employment fall within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding the equivalent of an advanced degree as defined at 8 C.F.R. § 204.5(k)(3). Thus, while the petitioner initially asserted that the beneficiary "has demonstrated exceptional abilities," that issue is moot. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The petitioner is a residential care facility for residents with Alzheimer's disease. The petitioner states:

> [The beneficiary's] primary area of work is to explore the development in Alzheimer research, risk management and management methods, regulatory policy, and related topics of interest to centralized system to properly fund Alzheimer research and allocate the latest successful findings to patients and resident care facilities nationwide. A successful model will then be utilized throughout the nation.

The petitioner initially elaborated as follows:

> [The beneficiary] will develop a model approach to create a centralized system to the distribution of research funds and the proper allocation of successful research findings to patients and facilities. She will collaborate with universities and research facilities to identify all existing Alzheimer research in the U.S. She will collaborate with the U.S. government and donors to determine the funds available and the additional funds needed. She will work with hospitals and medical insurance companies to formulate a centralized system to properly distribute the latest research findings to patients and facilities.

In response to the director's request for additional evidence, counsel asserts that funding has become more difficult for Alzheimer's researchers to obtain and that the beneficiary will create a centralized approach that will bring scientists together to research new treatments through a "group model" that will distribute its research through the beneficiary and receive compensation for any discoveries as allocated by the beneficiary. The petitioner submitted no evidence that any research institution has agreed to collaborate with the beneficiary under the conditions set forth above. The petitioner did not

even submit a business plan containing information regarding the project's organization, how it would evaluate grant applications, how it would determine compensation for discoveries, the project's staffing requirements, the project's projected budget, a marketing plan for raising funds and a timeline for the various stages of the project.

The substantial intrinsic merit of Alzheimer's research funding and making the latest research available is not at issue in this proceeding. At issue, however, are the proposed benefits of the beneficiary's intended work towards this goal. We must stress that unproven, untested ideas cannot be presumed to have substantial intrinsic merit. Rather, the substantial intrinsic merit must be documented.

On the uncertified ETA Form 9089, the beneficiary's position with the petitioner is listed as "controller." Her previous positions are listed as "controller" and "reconciliation analyst." Her education is in business and her training involves residential patient care, not research or fundraising. On the Form I-140 petition, the proposed position is listed as "Financial Research Analyst for Alzheimer Treatments." As the record does not suggest that the beneficiary's alleged future duties are related to her education, training or current position,[3] it would appear that the prospective duties discussed above were devised as a pretext to support a national interest waiver petition. As with job requirements, job duties with no good reason other than to justify the requirements for an immigration benefit are not always persuasive. *Cf. Defensor v. Meissner,* 201 F. 3d 384, 387 (5th Cir. 2000). Finally, merely repeating the language of the legal requirements does not satisfy the petitioner's burden of proof.[4]

The record contains evidence that the latest research is already available on the Internet and that there are already programs that offer help and information, such as the Alzheimer's Association and the Alzheimer's Disease Education and Referral (ADEAR) Center. While the record adequately demonstrates that additional funding for research has substantial intrinsic merit, the record fails to explain the intrinsic merit of raising funds through a new centralized entity operated out of a residential care facility rather than through the existing government agencies and private foundations discussed in the record that appear already centralized and already fund Alzheimer's research. These agencies and foundations presumably employ experienced fund raising staff and grant reviewers. Significantly, an editorial submitted by the petitioner that appeared in *Alzheimer's and Dementia,* a journal of the Alzheimer's Association, provides:

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[3] The proposed duties in disseminating research and raising and coordinating research funds are not included in the duties of a financial analyst, SOC Code 13-2051, as provided at www.bls.gov/oco/ocos301.htm, accessed on March 15, 2010 and incorporated into the record of proceedings. As stated above, SOC Code 13-2051 is the code listed on the Form I-140 for the proposed employment.

[4] *Fedin Bros. Co., Ltd. v. Sava,* 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd,* 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner,* 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. (D.C. Dist. 1990).

> During the early years of developing a national program of Alzheimer's research, the only successful strategy in achieving the dual objectives of increasing the appropriations for Alzheimer's research and recruiting new investigators to the field was to create new funding mechanisms. The development of special programs (or funding mechanisms) became the most effective tool for increasing [the budget of the National Institute on Aging (NIA)] by providing Congress specific targets for appropriations, as well as the means for advancing the Institute's programmatic goals. For example, programs such as the Alzheimer's Disease Research Centers (ADRCs), the Consortium to Establish Registries for Alzheimer's Disease (CERAD), Alzheimer' Disease Clinical Studies (ADCS), Leadership and Excellence in Alzheimer's Disease (LEAD), Alzheimer's Disease Education and Referral (ADEAR) center, and the Cross-Cultural and Epidemiological Studies Initiative were primarily responsible for the dramatic growth of federal funds allocated to Alzheimer's research. As an illustration, the LEAD program, at $1 million per award, increased NIA's budget by $10 million annually and increased the visibility and prestige of Alzheimer's research nationally as a result of the high-caliber recipients of these awards. At the same time, this program became a potent way of recruiting highly talented young investigators to the field under the tutelage of senior scientists.

The editorial further notes that the Alzheimer's Association is the major private funding entity in the United States and created the Zenith Award in 1991 to attract major gifts and donors and provide special recognition and support to established investigators with a track record of creativity. According to the editorial, the award has not only funded research but has assembled "an impressive cadre of highly dedicated donors that pledge to become Zenith Fellows by donating $1 million each to support the Association's scientific programs."

Nothing in the editorial suggests that a new unproven system operated out of a local residential care facility has substantial intrinsic merit when long-established apparently centralized entities such as the NIA and the Alzheimer's Association already exist to provide funding for necessary research and disseminate that research through peer-reviewed journals. While we reiterate that additional funding is in the national interest, the editorial also indicates that several private entities funnel new funds to the NIA (such as LEAD increasing NIA's budget by $10 million), revealing that NIA already serves as a centralized agency for distributing research grants. The record does not show how the beneficiary's work would result in new funds available for research rather than siphon funds from existing centralized organizations such as the NIA in order to fund a competing, untested funding structure. In light of the above, the petitioner has not demonstrated that there is substantial intrinsic merit in developing a competing research grant distribution system operating out of a local residential care facility by an individual with no experience running a research grant foundation.

The director then accepted that the proposed benefits would be national in scope. That conclusion is not supported by the record. *NYSDOT,* 22 I&N Dec. at 217, n.3, provides several examples of occupations that fall within nationally important areas such as services for the underrepresented,

education and nutrition, but provide negligible impact at the national level. Significantly, it is not enough to conceive of a means whereby the beneficiary's work could eventually have a national impact. To hold otherwise would render the national scope requirement meaningless. Rather, the petitioner must demonstrate that the proposed employment is within a framework that typically has such an impact, such as the alien in *NYSDOT*, who worked on the proper maintenance of bridges and roads already connected to the national transportation system. 22 I&N Dec. at 217. The beneficiary works for a local residential care facility with no history of past national impact or connection to the major Alzheimer funding or research entities through which the beneficiary proposes to collaborate. Thus, the petitioner has not demonstrated that the beneficiary's work for the petitioner will provide benefits that will be discernible at the national level.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Initially, the petitioner asserted that obtaining an alien employment certification for the beneficiary "could literally take years." The record does not support this assertion. The petitioner does not provide processing times for applications for alien employment certification at the Department of Labor or evidence that the processing times for second preference classification petitions with USCIS differ depending on whether they are supported by an approved application for alien employment certification. Regardless, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

In response to the director's request for additional evidence, counsel notes that the beneficiary has a degree and ten years of experience, two criteria for aliens of exceptional ability. 8 C.F.R.

§ 204.5(k)(3)(ii)(A), (B).[5] By statute, aliens of exceptional ability are generally subject to the job offer/alien employment certification requirement; they are not exempt by virtue of their exceptional ability. Section 203(b)(2) of the Act. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise. *See also NYSDOT,* 22 I&N Dec. at 218, 222.

Counsel then acknowledges that the beneficiary's work "has never been done before" as she proposes to "develop a 'new model' approach." Counsel continues that, because of this fact, "the focus must be on the alien's past record." Counsel then concludes that the beneficiary's past record demonstrates that she has "unique qualifications that no other individual has to justify the projections of future benefit to changing the approach to the centralizing and allocation of Alzheimer's findings." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Moreover, merely repeating the language of the precedent decision does not satisfy the petitioner's burden of proof.[6]

As noted by counsel, in addition to her business education and financial experience (which does not include fund raising or grant management), the beneficiary has training in residential care for patients with dementia. The petitioner, however, does not propose that the beneficiary will be engaged in caring for patients, which has only local benefits. None of the beneficiary's training relates to public affairs (as would be required to disseminate recent research), review of grants for Alzheimer's research, or fundraising. The record lacks evidence that the beneficiary has the support of, or connections with, the major research institutions, government agencies, or donors the petitioner claims the beneficiary will bring together.

On appeal, counsel asserts that the director erred in looking only at the beneficiary's past record without inquiring into the beneficiary's "future work." Counsel states: "[The beneficiary] must be afforded an opportunity to demonstrate the national interest work involved." As stated above, the inclusion of the term "prospective" is used in *NYSDOT,* 22 I&N Dec. at 219, to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.* The beneficiary in this matter has no demonstrable prior achievements collecting research for dissemination or raising and distributing research funds and has not even presented a business plan. Thus, any benefit to the national interest is entirely speculative.

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[5] Significantly, the petitioner did not document that the beneficiary has 10 years of experience "in the occupation" listed on the Form I-140 as required by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B).

[6] *Fedin Bros. Co., Ltd. v. Sava,* 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd,* 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner,* 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. (D.C. Dist. 1990).

Finally, counsel concludes that the beneficiary "is one of the few individuals performing this work now in the U.S. The lack of others engaged in such research is compelling." First, the record contains considerable evidence of major foundations organized to raise money for Alzheimer's research and to provide information to patients and their families. The opinions of these entities and their affirmation of the beneficiary's influence on their work are conspicuously absent from the record. Regardless, the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved application for alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.